IN THE

# SUPREME COURT

## OF THE UNITED STATES

OCTOBER TERM, 1923.

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| THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, *Appellant*, v. R. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees*. | Nos. 540 and 790 |
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*Attorney General of the State of Washington.*

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*Assistant Attorney General of the State of Washington,*

THOS. J. L. KENNEDY,
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*Of Counsel.*

*Attorneys for Appellees.*



FRANK M. LAMBORN, PUBLIC PRINTER, OLYMPIA

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### STATEMENT.

The statement of the case has been fairly made in the brief of appellant and we have nothing to add

thereto and no comment thereon, except that in the third paragraph of page 13 of the brief in the Pacific case, the statement is made that the district court granted a motion to dismiss on the ground primarily that the suit had been prematurely brought. We call attention to the order of dismissal which recites that the motion to dismiss is sustained "upon the grounds that the bill of complaint herein does not state any matters of equity entitling the complainant to the relief prayed for; that said bill of complaint does not state facts sufficient to entitle complainant to any relief against the defendants; and that said bill has been prematurely brought by reason of the failure to exhaust the right of plaintiff to relief in the superior and supreme courts of the state of Washington." Arguments were urged and authorities cited by the appellees herein in support of all three grounds referred to and the record does not justify the statement that the bill was dismissed primarily for one ground more than for another.

A few words of explanation are deemed necessary before beginning the formal argument. Upon receipt of news that these four cases had been advanced, we telegraphed the clerk as to whether separate briefs would be required, and were advised that one brief would be sufficient, and we are therefore covering all four cases in the one brief. We have not received a copy of the record in cases numbered 789 and 790, and reference throughout this brief to the transcript are to the transcript in cases numbered

539 and 540 which, we understand, is identical with the transcript in the other cases up to page 164 in the Pacific case and page 132 in the Home case. Inasmuch as the same points of law are involved in both the Pacific and Home cases, it is unnecessary to continually repeat the names of both companies, and throughout this brief we have used the term "appellant" as referring to either or both of the telephone companies, and the term "complaint" refers to either or both complaints unless otherwise specifically noted.

## ARGUMENT.

The argument of appellees in this brief will be devoted to a showing that the order of the statutory court dismissing the temporary restraining order and denying a preliminary injunction, and the order of the district court sustaining the motion to dismiss and dismissing the suit, were correct and should be affirmed. For convenient treatment, we have divided the argument into two main divisions: (1) That these actions are prematurely instituted because relief in the state courts was not exhausted; and (2) That the complaint was properly dismissed because of want of equity and insufficient averments of fact.

### I.

### These Actions Are Prematurely Instituted Because Relief in the State Courts Was Not Exhausted.

(*a*) *Question of Daily Confiscation not Involved.*

Appellants in their brief have contended that where a utility is daily suffering confiscation, it is unnecessary for it to await the determination of the legislative processes of rate making and valuation in the state tribunals before resorting to the federal courts for relief. We wish at the outset to emphasize the fact that no question of daily confiscation is now before this court for consideration. As will be pointed out in detail in the second portion of this

brief, the complaints are not sufficient to make a *prima facie* showing of daily confiscation.

At the time of filing the complaints, the appellants filed certain affidavits setting forth various conditions relative to their business. These affidavits are not referred to in the bills of complaint, nor do the affidavits themselves make any reference to the complaints. If it were not for the caption on the cover of the affidavits and the statement on that cover that they are in support of the bills of complaint, there would be no apparent connection between the complaints and the affidavits. These affidavits are not pleadings in the case and cannot be considered in determining the sufficiency of the complaints. These affidavits were apparently filed as evidence in support of the application for preliminary injunction. The three judges in their opinion concluded with the following statement:

"Reaching this conclusion, the question of the rates, whether fair, reasonable or confiscatory in character, has not been considered." (Tr. No. 539, p. 132; Tr. No. 540, p. 163.)

The statutory court not having considered the merits as to the alleged confiscatory nature of the rate complained of, evidently did not consider these affidavits. Furthermore, the statements in the affidavits are controverted by affidavits of the appellees. In the Pacific case, the affidavit of E. V. Kuykendall (Tr. No. 540, p. 126) was filed, and in the Home case, the affidavits of E. V. Kuykendall (Tr. No. 539, p.

105) and Alex M. Winston (Tr. No. 539, p. 112) were filed by the appellees in support of the motion to dismiss the restraining order and denying the interlocutory injunction.

So far as the question of confiscation could be involved in this appeal, it must be considered on the pleadings and not upon any issue on the merits dependent upon statements in appellants' affidavits contradicted by appellees' affidavits. In such a case, so far as the merits are concerned, this court will follow the rule expressed in the case of *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290; 43 Sup. Ct. 353, and the cases remanded to the district court without an expression of opinion by this court upon the merits of the controversy.

The record before this court on these appeals will not warrant any consideration of the questions of law involved on the assumption that the complaining utility is suffering daily confiscation. If any presumption is to be indulged in by this court, it is in favor of the correctness of the order of the department and the decrees of the lower court.

We also ask this court to bear in mind that the order of the Department is not one which decreased the rates of the appellants, but merely continues in effect war-time rates originally established by the Postmaster General during the period of Federal control.

(*b*) *Washington State Courts Have Legislative Authority in Reviewing the Order of the Department of Public Works Here Complained of.*

Section 10424, Rem. Comp. Stat., reads as follows:

"Whenever any public service company shall file with the commission any schedule, classification, rule or regulation, the effect of which is to increase any rate, fare, charge, rental or toll theretofore charged, the commission shall have power, either upon its own motion or upon complaint, upon notice, to enter upon a hearing concerning such proposed increase and the reasonableness and justice thereof, and pending such hearing and the decision thereon the commission may suspend the operation of such rate, fare, charge, rental or toll for a period of ninety (90) days from the time the same would otherwise go into effect, and after a full hearing the commission may make such order in reference thereto as would be provided in a hearing initiated after the same had become effective: *Provided*, that if any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding sixty (60) days.

"At any hearing involving any change in any schedule, classification, rule or regulation the effect of which is to increase any rate, fare, charge, rental or toll theretofore charged, the burden of proof to show that the changed schedule, classification, rule, or regulation, or the increased or proposed increased rate, fare, charge, rental or toll, is just and reasonable shall be upon the public service company.

"The commission shall give to the hearing and decision of such questions preference over all other questions pending before it and shall decide the same as speedily as possible.

"If the commission shall at the conclusion of the hearing refuse to permit such increase, either in whole or in part, no supersedeas shall be granted in any action or proceeding brought to review the order of the commission pending the final determination of such action by the superior court, or, if appealed to the supreme court, by such supreme court."

Section 10441, Rem. Comp. Stat., is set out in full in an appendix to appellants' briefs, and for that reason is not quoted here.

After the Department of Public Works, one of the appellees herein and hereinafter referred to as the Department, suspended for a period of ninety days the proposed rates filed by appellants, it proceeded upon a series of hearings for the purpose of determining whether or not the proposed rates filed by appellants were fair and reasonable. To determine this question it became necessary to ascertain the value of appellants' property, as necessarily the question of valuation is of most vital importance in determining whether a rate is a reasonable one. The only law authorizing the department to value property of public service companies is section 10441, Rem. Comp. Stat., and it is therefore reasonable to presume that the Department, in computing the value of the property belonging to appellants, did so in accordance with law and under the provisions of section 10441, *supra*. At the conclusion of the hearings the Department entered an order denying the proposed rate increase filed by appellants, and among other things, made a finding of fact relative to the

value of appellants' property. (Tr. No. 539, p. 27.) In No. 539 the Department found that the value of the property of the Pacific Telephone & Telegraph company, including the Spokane exchange, was, on June 30, 1922, $32,108,853.76 (Tr. No. 540, p. 41). The Department therefore entered into an investigation and determined the value of appellants' property for the purpose of determining whether the proposed increased rates were reasonable and fair, and made a finding on the question of value in the order denying an increase in rates. Section 10441, *supra,* provides that an appeal may be taken from the order of the Department fixing value, and that the superior court may substitute a different value from the value found by the Department, and the Supreme Court has like power. The appellant in its complaint in the *Pacific* case (Tr. No. 540, p. 5), alleges that the fair and reasonable value of its property in the state, not including Spokane, is $35,616,896.00, and in the *Home* case (Tr. No. 539, p. 4) the corresponding figure for the Spokane exchange is alleged to be $5,710,684.00, making a total alleged fair value of the entire state of $41,327,580.00. The appellants contend that they are entitled to a return of eight per cent on this fair value. It is apparent from the foregoing statute that in so far as the difference between the appellants and the Department rests upon a difference in valuation, the matter could have been determined by the state courts. There can be no

question that the process of fixing value is legislative in its character.

*City of Bluefield v. Bluefield Water Works & Improvement Co.*, 94 S. E. 121.

In the case of *Prentis v. Atlantic Coast Line*, 211 U. S. 210, on this question the court said:

"Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate and the proportion between the two—pure matters of fact."

Inasmuch as appellants did not appeal from the order of the Department denying their increase and making a finding on the valuation and the courts have power to exercise legislative functions on such an appeal, it is apparent that the legislative process under the jurisdiction of the state has not been exhausted on account of the failure of the appellants to take such appeals.

In the case of *Prentis v. Atlantic Coast Line*, 211 U. S. 210, it appeared that Federal jurisdiction was invoked for the purpose of restraining the Virginia State Corporation Commission from publishing or taking any steps to enforce a certain order fixing passenger rates, on the ground that such rates were confiscatory in their character. The statutes of Virginia provided that appeals might be taken from the order of the Commission to the Virginia courts, which courts exercised legislative functions in determining such appeals, which delegation of power to

the Virginia courts was sanctioned by the Virginia constitution. The contention was made in that case that the railroad company must first exhaust its remedy in the state court before invoking Federal jurisdiction by reason of the fact that the legislative process was not complete, and this contention was upheld by the Supreme Court, wherein it was said (p. 229):

"Our hesitation has been on the narrower question whether the railroads, before they resorted to the Circuit Court, should not have taken the appeal allowed to them by the Virginia constitution at the legislative stage, so as to make it absolutely certain that the officials of the State would try to establish and enforce an unconstitutional rule. Considerations of comity and convenience have led this court ordinarily to decline to interfere by *habeas corpus* where the petitioner had open to him a writ of error to a higher court of a State, in cases where there was no merely logical reason for refusing the writ. The question is whether somewhat similar considerations ought not to have some weight here."

It appears in the case of *Oklahoma Natural Gas Co. v. Russell*, 43 Sup. Ct. Rep. 353, that the plaintiffs are corporations under the laws of Oklahoma and furnish natural gas to consumers at rates established by the corporation commission. They applied to the commission for higher rates, but were denied an advance. The Constitution of Oklahoma was also similar to that of Virginia, construed in the *Prentis* case, *supra*, and gave the courts legislative power in determining appeals from the corporation commission with power to substitute a different order from

the order appealed from. Appeals were taken to the Supreme Court, and a supersedeas was applied for, but refused. After the supersedeas was denied, bills were filed in the District Court to restrain the commission from enforcing them on the grounds that they were confiscatory of the company's property. Objection was made to such bills on the ground that they must wait until the state courts denied the appeals before Federal jurisdiction could be invoked, and the court there held (p. 354):

"Coming to the principal question, if the plaintiffs respectively can make out their case, as must be assumed for present purposes, *they are suffering daily from confiscation under the rate to which they now are limited. They have done all that they can under the state law to get relief and cannot get it.* If the Supreme Court of the State hereafter shall change the rate, even *nunc pro tunc*, the plaintiffs will have no adequate remedy for what they may have lost before the Court shall have acted." (Italics ours.)

This case is squarely in point, and holds that where an appeal is provided for by state statute to a state court which can exercise legislative duties on such an appeal, that the service corporation must first ask for a stay in the state court before the Federal courts will assume jurisdiction. In the instant case no application was ever made to the state courts for a stay. For this reason it would seem that the *Oklahoma Natural Gas Co.* case, *supra*, is controlling here, and that the District Court could not assume jurisdiction until an

application for a stay had been made in the state courts as held by the opinion of the three judges in refusing to pass upon an application for a temporary injunction.

The case of *Prendergast v. New York Telephone Co.*, 262 U. S. 43, is in no way in point in this question, as the statutes of the state of New York providing for appeals to the courts from orders of the public service department did not vest the courts with any legislative power in determining such appeals.

The case of *Love v. Atchison T. & S. F. R. Co.*, 185 Fed. 321, which is relied on by appellants, is clearly not in point, because it appears in that case that the constitution of Oklahoma fixed the passenger fare of railroads at two cents per mile. The railroad company sought to enjoin the members of the corporation commission of Oklahoma from enforcing this provision of the constitution. Clearly, the railroad company had no other alternative than to seek Federal jurisdiction, as no appeal would lie in the state courts from an order of the commission enforcing such rate, as shown by the following language (p. 324):

"The records before us present no such case. The passenger fare of two cents per mile was prescribed by section 37 of the Constitution of Oklahoma, which prohibited a higher rate. No escape from this fiat was given by appeal or by supersedeas, and the only intimation of possible relief from it through the rate-making officers of the state government is found in the proviso which the section contains to the effect that the Corporation Commission

shall have the power to exempt any railroad company from the operation of the fare upon satisfactory proof that the company cannot earn a just compensation for its services to the public, unless it is permitted to charge more than two cents per mile for the transportation of passengers within the state. This proviso, however, grants no authority to the Commission to make fares, to fix a reasonable fare, or to determine the reasonableness of any fare fixed. It does not even give the Commission power to exempt a railroad company from the operation of the two-cent fare, unless that fare and all the other fares and rates of the company, taken together, are proved to its satisfaction to be confiscatory, and the exercise of this power is necessarily not a legislative, but a judicial, function. Its exercise requires the determination of the question whether or not section 37 of the Constitution of the state is violative of the fourteenth amendment of the Constitution of the United States, and the jurisdiction to determine that question is granted by the Constitution and the laws of the United States to the federal courts, and no law or act of any state may deprive them of the power or relieve them of the duty to perform this function when those entitled to their decision properly invoke their action. *Chicot County v. Sherwood*, 148 U. S. 529, 13 Sup. Ct. 695, 37 L. Ed. 546; *General Oil Co. v. Crain*, 209 U. S. 211, 212, 28 Sup. Ct. 475, 52 L. Ed. 754; *Barber Asphalt Paving Co. v. Morris*, 66 C. C. A. 55, 59, 132 Fed. 945, 949, and cases there cited."

### (c) *Section 10441, Rem. Comp. Stat. is Constitutional.*

It is contended in appellants' briefs that section 10441, Rem. Comp. Stat., in so far as it attempts to grant legislative authority to the courts, is unconstitutional as violating the provisions of the consti-

tution of the state of Washington which separates the state government into the executive, judicial and legislative departments and prescribes the officers and duties of each. While this is in a sense true, it will be noted that nowhere in the constitution of the state of Washington does it expressly provide that legislative functions may not be performed by judicial officers, or vice versa, as is the case in a majority of the constitutions of the several states, and this separation into the three branches of government is only by implication in the constitution of the state of Washington.

In the case of *Bellingham Improvement Co. v. New Whatcom*, 20 Wash. 53, 54 Pac. 774, it appeared that the local improvement law of the state of Washington provided that the city council shall enter a decision determining the regularity, validity and correctness of the assessment, and it was urged that such law was unconstitutional in conferring judicial powers upon a legislative body, contrary to section 1, article 4 of the constitution of the state of Washington, which provides, in substance, that the judicial power of the state shall be vested in the supreme court, superior courts, justices of the peace and such inferior courts as the legislature may provide. In holding that the council might exercise such powers, the court said (p. 57):

"It has been common for courts to use expressions to the effect that judicial powers could not be conferred upon bodies other than courts under con-

stitutions with provisions similar to ours; but the term 'judicial powers' has not, by the constitution, been defined, nor do we think it is susceptible of any specific definition. Section 1 of article 4 of the constitution evidently means that the judicial power of the state which is exercised by courts shall be vested in the supreme and superior courts and justices of the peace and such inferior courts as the legislature may provide. It is more in the nature of a declaration of the names of courts than it is of a definition of judicial power; and this article of the constitution must have been enacted with the knowledge that *quasi* judicial powers have from time immemorial been conferred upon administrative bodies and officers, such as assessors, boards of county commissioners, boards of equalization, auditors, and even sheriffs, who frequently have to decide as to the value of property in cases of exemptions and in other respects. Again, there is a distinction, which the courts have observed, between judicial investigation and decisions concerning the relative rights of individuals and the rights of individuals and the public."

Obviously, if judicial powers of this character might be exercised by a legislative body, the converse would also be true, and that acts somewhat legislative in their character might be performed by judicial bodies under the constitution of this state. Illustrating the point that the constitution of this state does not distinctly draw the lines between legislative, executive and judicial power, is the following quotation from the case of *State ex rel. Oregon R. Etc. Co. v. R. R. Com.*, 52 Wash. 17, 100 Pac. 179 (p. 32):

"The contention is also made that the commission act provides for the intermingling of legislative, executive, and judicial power. If we have given the statute proper construction, the concessions made by

counsel for appellant as to the character of the commission laws which it is within the powers of the legislature to enact, renders unnecessary a discussion of this proposition; but yielding the courtesy of discussion, while there is no question that the constitution of the state recognizes a division of the powers of the state into three separate co-ordinate departments, viz., legislative, executive, and judicial, it is well established that the special jurisdiction of each is understood to be applied in a limited sense, and it is not meant that they must be kept wholly and entirely distinct without any connection or dependence whatever or connecting link between them."

Again, in the case of *State ex rel. C. M. Etc. R. Co. v. Public S. Com.*, 94 Wash. 274, 162 Pac. 523, the court said (p. 280):

"We have repeatedly held that the legislature may constitutionally confer on the commission judicial powers as a mediatory tribunal, since the constitutional division of governmental powers into the three separate departments applies only in a limited sense and does not restrict one set of officers to one department exclusively. *State ex rel. Oregon R. & Nav. Co. v. Railroad Commission*, 52 Wash. 17, 100 Pac. 179; *State ex rel. Railroad Commission v. Oregon R. & Nav. Co.*, 68 Wash. 160, 123 Pac. 3; *State ex rel. Railroad Commission v. Great Northern R. Co.*, 68 Wash. 257, 123 Pac. 8. It is therefore clear that, before this court can hold that any attempt of the legislature to confer on the commission a given power is void as an unconstitutional delegation of either legislative or judicial power, it must clearly appear that the power in question is purely legislative or judicial, and not merely incidental to some of the administrative powers for the exercise of which the commission was created."

The constitution of the state of Washington does not in express terms say that powers legislative in their character cannot be performed by judicial officers, and this has been the construction of the constitution of the state of Washington placed on it by the supreme court of the state of Washington as evidenced by the cases just quoted, which are binding upon this court.

In the case of *Keller v. Potomac Electric Power Co.*, 43 Sup. Ct. Rep., 445, it appeared that Congress had given legislative powers to the courts of the District of Columbia in appeals from an order of the public utilities commission, and in holding that Congress had such power, the court said (p. 448):

"Can the Congress vest such jurisdiction in the courts of the District of Columbia? By the Constitution (clause 17, section 8, article 1) Congress is given power 'to exercise exclusive legislation in all cases whatsoever, over' the District of Columbia. This means that as to the District Congress possesses, not only the power which belongs to it in respect of territory within a state, but the power of the state as well. In other words, it possesses a dual authority over the District, and may clothe the courts of the District, not only with the jurisdiction and powers of federal courts in the several states, but with such authority as a state may confer on her courts. *Kendall v. United States*, 12 Pet. 524, 619, 9 L. Ed. 1181. Instances in which congressional enactments have been sustained which conferred powers and placed duties on the courts of the District of an exceptional and advisory character are found in *Butterworth v. Hoe*, 112 U. S. 50, 60, 5 Sup. Ct. 25, 28 L. Ed. 656, *United States v. Duell*, 172 U. S. 576, 19 Sup. Ct. 286, 43 L. Ed. 559, and *Baldwin Co. v. R. S. Howard*

*Co.*, 256 U. S. 35, 41 Sup. Ct. 405, 65 L. Ed. 816. Subject to the guaranties of personal liberty in the amendments and in the original Constitution, Congress has as much power to vest courts of the District with a variety of jurisdiction and powers as a state Legislature has in conferring jurisdiction on its courts. In *Prentis v. Atlantic Coast Line, supra,* we held that, when 'a state Constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned.' 211 U. S. 225, 29 Sup. Ct. 67, 69 (53 L. Ed. 150); *Dreyer v. Illinois,* 187 U. S. 71, 83, 84, 23 Sup. Ct. 28, 47 L. Ed. 79.

"It follows that the provisions in the law for a review of the Commission's proceedings by the Supreme Court of the District and for an appeal to the District Court of Appeals are valid."

Again, in the case of *Louis. & Nash. R. R. Co. v. Garrett,* 231 U. S. 298, on page 314, the court said:

"Undoubtedly, a State may permit appeals to its courts from the rate-making orders of its railroad commission and, upon the review of such orders, it may expressly authorize its judicial tribunals to investigate and decide questions which otherwise would not belong to them, or even to act legislatively *(Prentis v. Atlantic Coast Line, supra).* But the guaranties of the Fourteenth Amendment do not entitle the carrier to the exercise by the courts of such extra-judicial authority."

(d) *If Section 10441, Rem. Comp. Stat., is Unconstitutional, It Should Be First So Declared By the Supreme Court of the State of Washington.*

It is claimed by appellants that section 10441, *supra,* is unconstitutional as being in contravention of the form of the provisions of the constitution of

the state of Washington, and not as being in contravention of the Federal Constitution. In this state of facts it is a well recognized rule that Federal courts are very reluctant to pass upon the constitutionality of a state statute as being in violation of the constitution of the state prior to the time that a decision on this question has been rendered by the state court. Furthermore, a decision of the state court on this question is binding upon the Federal courts, but the contrary is not true. If this court should hold this statute unconstitutional, its decision would not be binding on the Supreme Court of the state of Washington, which might subsequently hold such statute constitutional, which would be binding on this court. In *Cook v. Burnquist*, 242 Fed. 321, on page 328, the court said:

"As has been stated here upon the argument by counsel for the defendants, the authorities are almost overwhelming to the effect that a federal court is very loath to declare a state statute contrary to the state Constitution, when that state statute has not received an interpretation at the hands of the Supreme Court of the state. That doctrine has been announced by the Supreme Court of the United States, not only in the case of *Louisville & Nashville Railroad v. Garrett*, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. Ed. 229, but also in the case of *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, also in the very recent case of *Pullman Co. v. Knott*, 235 U. S. 23, 35 Sup. Ct. 2, 59 L. Ed. 105, and it has also been announced numbers of times by lower courts. So that, unless it is perfectly plain on the face of it that section 3 of chapter 261 of the Statutes of Minnesota of 1917 is a delegation of legis-

lative power, such as is forbidden or not allowed under the state Constitution, this court would hesitate to hold that statute unconstitutional."

Again, in the case of *Hunter v. Pittsburgh,* 207 U. S. 161, on page 176 the court said:

"We have nothing to do with the policy, wisdom, justice or fairness of the act under consideration; those questions are for the consideration of those to whom the State has entrusted its legislative power, and their determination of them is not subject to review or criticism by this court. We have nothing to do with the interpretation of the constitution of the State and the conformity of the enactment of the Assembly to that constitution; those questions are for the consideration of the courts of the State, and their decision of them is final. The Fifth Amendment to the Constitution of the United States is not restrictive of state, but only of national, action."

In speaking on this question in the case of *Michigan Central Railroad v. Powers,* 201 U. S. 245, on page 291, the court said:

"At the same time the Federal courts will be reluctant to adjudge a state statute to be in conflict with the state constitution before that question has been considered by the state tribunals. * * * And this reluctance becomes more imperative when the statute has been before the highest court of the State and a decision rendered upon the assumption that it is valid, and this, although the direct question of validity was not presented nor determined."

The last quotation is determinative of this question, as the Supreme Court of the state of Washington, in the case of *Everett v. Department of Public Works,* 125 Wash. 341, 215 Pac. 1045, had occasion

to refer to section 10441, *supra*, and passed upon the question presented to it on the assumption that section 10441 was constitutional, although the constitutionality of the statute was not raised nor passed upon.

The following pertinent cases, showing the recognition by the Federal courts of the rule of "comity and convenience" are also called to the court's attention.

In the case of *United States v. Anderson*, 169 Fed. 201, the District Court of Idaho, Central Division, in considering the question of concurrent jurisdiction in a naturalization proceeding, states:

"But assuming that the court cannot decline to entertain the petition, every consideration of comity, if not of judicial courtesy, requires that a conclusion be reached in harmony with that of the state court. Any other policy would be intolerable, resulting in confusion of judicial decision and the consequent bewilderment of suitors, and also engendering antagonisms between the courts. If in this matter this court can to-day set aside the judgment of the state district court, there is no reason why that court may not to-morrow send its process here, directing the vacation of an order of this court in some other naturalization matter, should the government feel aggrieved and apply to it for relief. *With the growing complexity of state and national relations, and in view of the ever-increasing conflict of jurisdiction between the state and the federal courts, it is of the highest importance that in exercising their powers the courts of one class shall proceed with scrupulous regard and due deference to the dignity and rights of the courts of the other class.*" (Italics ours.)

In the case of *Boston and M. R. R. v. Niles*, 218 Fed. 944, a preliminary injunction hearing before the three judges under section 266 of the Judicial Code, the District Court of New Hampshire observes:

"The question as to where a grievance of this kind should first be entertained is more a question of desirability, convenience, and comity than a question of right, and we are not disposed to follow the proposition of the right of way through priority of jurisdiction further than to cite a note, containing authorities, which appears in 22 C. C. A. at page 358. It must be said, however, that aside from the force resulting from priority of jurisdiction is the further consideration that *United States courts are reluctant to deal with state statutes with a view to sustaining or overthrowing them before the state courts have first had an opportunity to do that. The Supreme Court has repeatedly said that.* It is said by Mr. Justice Hughes in *Louis. & Nash. R. R. Co. v. Garrett*, 231 U. S. 298, 305, 34 Sup. Ct. 48, 58 L. Ed. 229. It is said in effect by Mr. Justice Holmes in the *Prentis* case, 211 U. S. 230, 29 Sup. Ct. 67, 53 L. Ed. 150, in which both Chief Justice Fuller and Mr. Justice Harlan, though concurring in the result, dissent from the opinion because it does not go far enough on lines of comity. It has more recently been said in an opinion by Mr. Justice Holmes, handed down November 2, 1914, in *Pullman Co. v. Knott*, 235 U. S. 23, 35 Sup. Ct. 2, 59 L. Ed. —. It is true that these cases have reference to statutes which it is claimed offend state Constitutions, but it is not perceived that the reason of its being a state Constitution instead of the federal Constitution was the controlling reason. As has already been said the federal Constitution is a part of the system under which the state courts operate, and it is because the state courts recognize the federal system as a part of their own that *rules of comity require, and particularly in cases first pending before them, that they should first have*

*an opportunity to pass upon the statutes of their own state.* It is incumbent upon the federal courts, in such a situation as this, to presume that, if the Supreme Court of the United States has declared a statute like the one involved here to be in contravention of the federal Constitution, the Supreme Court of New Hampshire will give the force of such a decision its proper consideration and scope. Such a presumption results in a large measure because of the strong expressions by state courts like those of Mr. Justice Cullen in *Bearsley v. New York, L. E. & W. R. R. Co.*, 162 N. Y. 230, 56 L. Ed. 488, that 'in obedience to the law, as declared by the Supreme Court of the United States, we must hold the statute of 1895 is invalid,' that of the Supreme Court of Appeals of Virginia in the *Coast Line Ry. Co.* case, 106 Va. 61, 67, 55 S. E. 572, 574 (7 L. R. A.—N. S.—1086, 117 Am. St. Rep. 983, 9 Ann. Cas. 1124), that 'we are bound by this decision, as it emanates from the highest tribunal in the country,' and numerous like expressions which could be cited, if deemed necessary." (Italic ours.)

The District Court for the Northern District of California, Second Division, in the case of *Palermo Land & Water Co. v. Railroad Commission*, 227 Fed. 708, involving a suit to enjoin the railroad commission of California from enforcing a rate order, observes:

"This is rested, not only upon well-settled principles of equity jurisprudence, but upon the dictates of comity as well; that where a state has provided, as is its right, a complete legislative scheme for the fixing of rates, those rights should not be interfered with, nor the proceedings of the state arrested, until the last legislative step has been taken, and it may definitely be seen whether the act of the state as a

finality ignores or infringes upon the rights of the complaining party; that until such time it cannot be said that the state authorities have violated those rights, or refused to observe them, and until that stage is reached it is not within the province of the federal courts to interfere. As aptly and tersely put by the Chief Justice in his concurring opinion:

"'The transaction must be complete, and jurisdiction cannot be rested on hypothesis. A fortiori, this must be so where federal courts are asked to interfere with the legislative, executive or judicial acts of a state, unless some exceptional and imperative necessity is shown to exist, which cannot be asserted here. Moreover, this is demanded by comity, and what comity requires is as much required in courts of justice as in anything else. * * * And as applied to federal interference with state acts, the observance of this rule of comity should be regarded as an obligation. It is recognized as such by section 720 of the Revised Statutes'."

The District Court for the Southern District of Florida in the case of *Jackson v. Cravens*, 235 Fed. 212, another three-judge hearing on a preliminary injunction application, states:

"It will, however, be difficult to cite a case where, on *an application for preliminary injunction*, a court of the United States devoid of original jurisdiction, save for the federal question involved, *will undertake to test the validity or effectiveness of state legislation*, in the light of the state Constitution, or review in any way the discretion of the state Legislature as expressed in the enactment." (Italics ours.)

(e) *The Supreme Court of the State of Washington Has Inherent Power to Suspend an Order of a Lower Tribunal by Virtue of Article IV, Section 4, of the Constitution of the State of Washington.*

Appellants contend that the rule announced in the Oklahoma Natural Gas Co. case, *supra*, is not applicable here because sections 10424 and 10429, Remington's Compiled Statutes, deny them a stay in a proceeding of this character, and that they should not be compelled to do a useless thing and ask for a stay when such stay is denied them by statute. Article IV, section 4, of the constitution of the state of Washington, reads as follows:

"The supreme court shall have original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any superior court of the state, or any judge thereof."

It is our position that the jurisdiction of the courts of record in the state of Washington is dependent upon the constitution. Certain jurisdiction is given them by the constitution which cannot be abridged by the legislature. While we do not wish to be understood as absolutely taking the position that these statutes just referred to are unconstitutional, yet we do claim that there is sufficient doubt as to their constitutionality to warrant the three-judge court in directing appellants to apply for a stay in the state courts before they would pass on their application for an interlocutory injunction, and that in any event it was incumbent upon appellants to first ask the state courts for such stay.

In the case of *State ex rel. etc. v. Superior Court*, 15 Wash. 668, 47 Pac. 31, the question arose as to the power of the supreme court to issue a writ of prohibition. In holding that the jurisdiction of the supreme court is dependent upon the constitution, the court said (p. 672):

"It thus appears that the jurisdiction of the supreme court and of the superior courts of this state is expressly defined by the constitution, and reference must therefore be had to that instrument in order to determine the question of jurisdiction in any particular case; and it will be observed that by the terms of the constitution both this court and the superior courts are empowered to issue writs of prohibition."

It will be noted that article IV, section 4, of the constitution of the state of Washington, gives the supreme court of the state power to issue writs of

prohibition, and in the case of *Windsor v. Bridges*, 24 Wash. 540, 64 Pac. 780, it was held that the law in force defining the writ of prohibition at the time of the adoption of the constitution, and such law having restricted the writ to its common law function for the restraint of unauthorized judicial power, was the writ mentioned in the constitutional provision and that the original jurisdiction of the supreme court could not be extended by statute to include ministerial and administrative acts. In holding that the jurisdiction of the supreme court is to be determined by the constitution and not by statute, the court said (p. 546):

"The legislature has not the power, however, to create additional remedies under the name of such writs, and confer thereby on this court original jurisdiction for the enforcement of such remedies. The original jurisdiction of this court is fixed by constitutional limitations, and is derived from the constitution, and not in pursuance of any legislative enactment."

In the case of *In re Rainier Avenue*, 80 Wash. 688, 141 Pac. 1137, it appeared that the city had condemned some land and paid the award into court. An appeal was taken, but the city claimed the right to proceed with the improvement notwithstanding the appeal. The property owner then applied for a supersedeas pending the appeal. The city contended that under the statute, the court is without jurisdiction to grant a supersedeas. The statute does provide that no appeal from a judgment entered upon the

award of a jury shall delay proceedings under an ordinance directing public improvement if the city shall pay into court for the owners as directed by the court, the amount of the judgment and costs, and that such city, after making such payment, shall be allowed to enter upon the property condemned and proceed with the improvement. In holding under such circumstances that a supersedeas was proper, the court said (p. 691):

"The merits of the controversy are not now before us, and it will be understood that we express no opinion on the merits of the question suggested. They are mentioned for the purpose of showing that the controversy is real, and that, if they be found meritorious, a constitutional right of the appellant will be violated if the supersedeas is not granted."

In the case of *State ex rel. Barnard v. Board of Education*, 19 Wash. 8, 52 Pac. 317, it appeared that the board of school directors were about to discharge the superintendent of schools. The superintendent then applied for a writ of prohibition to prohibit the school directors from proceeding. On the return of said writ, the superior court sustained a demurrer quashing the alternative writ and entering judgment in favor of the defendants. The school superintendent then gave notice of appeal and asked for a supersedeas. Although no statute authorized a supersedeas in a case of this character, the court by virtue of the following language granted one (p. 10):

"Section 4 of article 4 of the constitution of Washington, after reciting the original jurisdiction of the supreme court, says further:

" 'The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction.'

"It is conceded that an appeal lies from the judgment of the court in quashing the writ, and, under the provision just read, for the purpose of making that appeal effective, and to insure the complete exercise of this court over that appeal, it becomes necessary and proper to supersede the judgment, otherwise the right to appeal which the statute has given would be of no avail to the appellant, for if the board of directors in the meantime were to proceed to remove him, when the case finally reached this court on appeal it would have to be dismissed for want of merit, because the trial on merit would already have terminated. *People v. Commissioners of Excise*, 61 How. Pr. 514. We think this is exactly the kind of a case which is contemplated by the constitution, and that the only way that this court could maintain the complete exercise of its appellate jurisdiction would be by issuing the writ prayed for. There would be no meaning to the provision of the constitution, and no necessity for it, if it could only be held to apply to cases where supersedeas was provided for by the law."

Again in the case of *Lund v. Idaho & Washington Northern R.*, 48 Wash. 453, 93 Pac. 1071, the court said (p. 455):

"This court has held, that to maintain the existing status and to preserve the fruits of litigation to an appellant, it has, in aid of its appellate jurisdiction and in the exercise of its discretion, authority to grant a supersedeas pending the determination of an appeal, and that it may do so although the appellant is not, as a matter of right, entitled to a supersedeas under any existing statute. *State ex rel.*

*Barnard v. Board of Education,* 19 Wash. 8, 52 Pac. 317, 67 Am. St. 706, 40 L. R. A. 317."

To the same effect is that portion of the opinion in *State ex rel. Davis & Co. v. Superior Court,* 95 Wash. 258, 162 Pac. 360, which reads as follows (p. 261):

"This court, in aid of its appellate jurisdiction, or in the exercise of its original jurisdiction, possesses all inherent power of courts of equity, and when it is made to appear that a party is being denied relief to which in equity and good conscience he is entitled, it is the duty of this court to find some method within its jurisdiction by which such relief may be granted."

Again, in the case of *Bier v. Clements,* 95 Wash. 505, 164 Pac. 82, the court said (p. 508):

"However, being of the opinion that appellant is entitled to a stay of the effect of the judgment here appealed from, in so far as it dissolves the temporary restraining order, and it being the settled law of this state that this court may in its discretion so act in aid of its appellate jurisdiction, we need not bother ourselves with the question of appellant's strict legal right under the statute to have the superior court fix the amount of a supersedeas bond to be given by him to the end that he may thereby have such stay as a matter of right without application to this court. Const., art. 4, sec. 4."

The doctrine of these cases seems to be that irrespective of the question of supersedeas, the jurisdiction of the courts of record of this state is defined by the constitution of this state, and that the legislature may not take away any jurisdiction from the courts which the constitution grants them. Under

article IV, section 4, the courts of record are given power to grant all rights necessary to their appellate jurisdiction, which would include the right to suspend an order of a lower tribunal when the litigants applying for such a suspension as a matter of equity were entitled thereto. The courts of this state are clothed with equity powers, and sitting as such have inherent power to suspend an order of a lower tribunal.

(*f*) *Application for a Stay in State Courts a Proper Condition Precedent to Jurisdiction of Federal Courts.*

Some contention is also made by appellants that in any event they are too late to appeal to the courts of the state and therefore there would be no remedy for them in taking such an appeal. Section 10428, Remington's Compiled Statutes, provides that an appeal must be taken within thirty days from the date of service of the order. No such appeal was ever taken and appellants should not now be heard to say that by virtue of their own dilatory actions and failure to take an appeal within the time prescribed by law they are entitled to invoke federal jurisdiction when otherwise they would not be. Also, section 10441, Rem. Comp. Stat., which provides for an appeal to the courts from valuation findings, does not prescribe a time when such appeal must be taken. It will be noted from the opinion of the three judges (Tr. No. 539, p. 119; Tr. No. 540, p. 150) that the

federal court did not refuse to take jurisdiction, but specifically retained jurisdiction and refused to proceed further in the case until appellants had applied to the superior and supreme courts of the state for a stay, and in the event the stays were denied, that the federal court would proceed to pass upon the application for an interlocutory injunction. The statutory court was familiar with local conditions. A hearing was proceeding in an orderly manner under state administration wherein appeals were provided for in the state courts. The three judges were of the opinion from all the facts and circumstances that in view of this situation and by virtue of the broad grounds of comity and convenience the more orderly procedure would be for the federal courts to refuse to pass upon the application for an interlocutory injunction until a stay had been asked for in the state courts. And it is submitted, in view of these facts and the discretion on this matter exercised by the three judges familiar with local conditions, that this court should be very reluctant to overrule the three judges on this question.

The obstacle placed in appellants' way by the three-judge court before it would pass on the application for a temporary injunction was not particularly onerous. All appellants had to do was apply to the state courts for a stay and if the same were denied the three-judge court would pass on their application for a temporary injunction. The application for a stay to the state courts would be much

easier and rapid than the appeal which they elected to take to this court. Appellants allege that they are suffering daily, although this allegation is denied by appellees, and for this reason desire a temporary injunction. If appellants had applied to the state courts for a stay and the stay had been refused, they could have had their hearing on the merits on their application for a temporary injunction disposed of more quickly than by taking an appeal to this court.

Furthermore, we call attention to the practise observed by this court and the federal courts when the question has been raised that the time has expired within which relief may be applied for in the state courts. It will be noted that the federal courts have declined to assume that the proper state tribunal will not afford relief because of the expiration of the statutory time, and statements to that effect from the following cases are submitted:

*Prentis v. Atlantic Coast Line*, 211 U. S. 210, 232; 53 L. Ed. 150, 161:

"There is yet another difficulty in applying to these cases the comity which it is desirable if possible to apply. The Virginia statute of April 15, 1903, enacted to carry into effect the provision of the constitution, requires, by section 34, certain, if not all, appeals to be taken and perfected within six months from the date of the order. 1 Pollard's Code of Virginia, c. 56a, 714. It may be that when an appeal is taken to the Supreme Court of Appeals this section will be held to apply and the appeal be declared too late. *We express no opinion upon the matter, which is for the state tribunals to decide, but simply notice a possibility.* If the present bills should be

dismissed, and then that possible conclusion reached, injustice might be done. As our decision does not go upon a denial of power to entertain the bills at the present stage but upon our views as to what is the most proper and orderly course in cases of this sort when practicable, it seems to us that the bills should be retained for the present to await the result of the appeals if the companies see fit to take them. *If the appeals are dismissed as brought too late the companies will be entitled to decrees. If they are entertained and the orders of the commission affirmed, the bills may be dismised without prejudice and filed again.*" (Italics ours.)

*Palermo Land & Water Co. v. Railway Commission*, 227 Fed. 708:

"In this case, however, the Commission has expressly declared at the bar and in its brief its readiness to entertain an application for a rehearing of the present order, notwithstanding the lapse of the usual time given for the purpose, and has intimated its readiness to suspend the effect of the order until such petition can be passed upon. Should such application be made, and relief denied for any reason, plaintiff will then be in a position to seek a judicial review of the order; but the present bill must, for the reasons indicated, be regarded as premature."

*Landon v. Court of Industrial Relations*, 269 Fed. 411:

"As to the 30-day period provided in the Kansas Statute above cited, it is sufficient to say that the provision in question has been held by the Supreme Court of Kansas not to be a statute of limitation. *Aetna Ins. Co. v. Lewis*, 92 Kan. 1012, 142 Pac. 954. See, also, *Emporia Telephone Co. v. Public Utilities Commission*, 97 Kan. 139, 154 Pac. 262. And even if said provision were in the nature of a statute of limitation, nevertheless a court of equity might still

entertain a suit of this character even after the statutory period. *Emporia* case, *supra*. See, also, *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 232, 29 Sup. Ct. 67, 53 L. Ed. 150."

*Air-Way Electric Appliance Corporation v. Archer*, 279 Fed. 878:

"The provisions of the Ohio Statute differ in various respects, which need not be detailed, from those of the Virginia Constitution and act under consideration in *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150: but the rule of comity there observed and the mode of procedure there adopted should, as far as practicable, control here. Whether the action of the plaintiff, after it was notified of the assessment made against it, rose to the dignity of a request or demand for a rehearing before the tax commission, and whether that body, if a request for a rehearing yet be made, will conclude that the request is not timely, or, out of a desire to be accurate and just, will grant a rehearing, regardless of the lapse of time, are questions for the commission to decide. In *Palermo Land & Water Co. v. Railroad Commission* (D. C.) 227 Fed. 708, the defendant in open court offered to entertain an application for a rehearing, although the usual time for applying therefor had expired. In the instant case the defendants have stipulated that the plaintiff's present status, during the pendency of this case and until its decision, shall be maintained, and that plaintiff shall not be subject to any penalties, fines, or forfeitures by reason of any default on its part in the payment of the tax charged against it. Being thus amply protected, the court need not at this time trouble itself over the question of injunctive relief or render final decision. Pending an application for review before the tax commission and the disposition of the same, the present bill will be retained to await the result of such proceedings. When the conclusion

reached is properly presented to the court, it will take such final action as it deems proper."

(a) *Decision in Pacific Telephone and Telegraph Company v. Cushman, 292 Fed. 930, Not Controlling in These Appeals.*

Appellants attach great importance to the decision of the Circuit Court of Appeals for the Ninth Circuit, in the case of *Pacific Telephone and Telegraph Company v. Cushman*, 292 Fed. 930, and have cited this case some six times in each brief. We will conclude this main division of our brief with a short discussion of that case.

When the district court declined to pass upon appellees' motion to dismiss in each of these cases for the reasons stated by the three judges in denying the interlocutory injunction, the Pacific Company applied to the Circuit Court of Appeals for a writ of mandamus to compel the district court to hear and dispose of that motion. Section 266 of the Judicial Code provides that an application for a preliminary injunction shall be heard by a special court of three judges. This statutory court has original and exclusive jurisdiction in determining this application, and the statute gives to the supreme court exclusive appellate jurisdiction to review the order of the three judges on such application. Prior to seeking a writ of mandamus from the Circuit Court of Appeals, appellant appealed to this court from the statutory court, and we think it very clear that the Circuit

Court of Appeals had no jurisdiction to review the order of the statutory court or the reasons upon which that court based its order. We think, therefore, that the opinion of the Circuit Court of Appeals in the *Cushman* case, *supra*, is mere dicta. We realize, of course, that even though dicta, the opinion of this learned court has much weight, but we respectfully submit that it is not entitled to as much consideration as the opinion of the statutory court, the court vested with jurisdiction to determine the issues on the application for preliminary injunction.

This was evidently the opinion of the district court in the instant cases, as after the opinion of the Circuit Court of Appeals had been rendered and the peremptory writ of mandamus issued, the district court proceeded to hear and determine appellees' motion to dismiss, and was evidently not convinced by the reasoning of the Circuit Court of Appeals, as the motion was sustained and the complaint dismissed, such dismissal being based in part upon the reasoning of the statutory court as to the premature seeking of relief from the federal court.

We believe that the opinion of the statutory court (Tr. No. 539, p. 119; Tr. No. 540, p. 150) is entitled to greater consideration and should be controlling on the questions involved in these appeals.

## II.

### Complaint Properly Dismissed Because of Want of Equity and Insufficient Averments of Fact.

#### (a) *Motion to Dismiss Does Not Admit Conclusions of Law.*

Equity rule No. 29 abolished demurrers and provided that every defense in point of law arising upon the face of the bill shall be made by motion to dismiss or in the answer. Defendants promptly appeared in these two cases and filed motion to dismiss on the grounds that the bill of complaint did not state any matters of equity entitling the complainant to the relief prayed for, and that the bill of complaint did not state facts sufficient to entitle complainant to any relief.

Upon the motion to dismiss, defendant admits only those facts which are well pleaded. Conclusions of law are not admitted.

*Pennie v. Reis*, 132 U. S. 469; 33 L. Ed. 428;
*U. S. v. Ames*, 99 U. S. 35; 25 L. Ed. 295;
*Portland Railway Light & Power Co. v. Portland*, 200 Fed. 890, 892;
*Young v. Mercantile Trust Co.*, 140 Fed. 61;
*General Electric Co. v. Westinghouse Electric & Manufacturing Co.*, 144 Fed. 467.

This motion to dismiss was argued before the district court on December 31, 1922, and was granted by the court and an order entered dismissing the bill of complaint. The various grounds relative to want

of equity and insufficient averment will be considered together at this time under this one general heading.

(*b*) *Insufficient Allegations of Compliance With State Law as to Foreign Corporations.*

The first paragraph of the bill of complaint in the Pacific case alleges (Tr. No. 540, p. 1):

"That it is a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business at San Francisco, in said state, and is a citizen of said state. That during all of the times referred to in this bill of complaint it has owned and operated and now owns and operates a telephone and telegraph system and has been and is now engaged in operating and conducting a public telephone and telegraph system in the State of Washington and elsewhere. *That it has complied with all the laws of the State of Washington relating to foreign corporations, has paid its annual license fee last past due, and is duly authorized to do business therein.*" (Italics ours.)

The italicized portion of the foregoing paragraph is purely a conclusion of law. The requirements of foreign corporations in the state of Washington will be found in sections 3852 to 3854, inclusive, Rem. Comp. Stat., 1922. Section 3853 provides in substance that foreign corporations shall file in the office of the secretary of state a certified copy of the articles of incorporation or other papers attested in the manner provided therein, and section 3854 provides that such corporation shall appoint an agent who shall reside at the place in the state where the principal business of the corporation is carried on,

which appointment shall be in writing, containing certain information set forth in detail in the section referred to. Unless appellant has complied with all the provisions of the Washington statutes as to foreign corporations, it has no legal right to do business in this state, and its complaint is defective and demurrable unless it has alleged therein the ultimate facts showing that all of such preliminary acts have been performed.

This question was considered in the case of *Southern Bell Telephone and Telegraph Co. v. Railroad Commission*, 280 Fed. 901, 906. The district court for the southern district of South Carolina in that case laid down the following rule:

"It is set out in the complaint that the complainant is duly and legally qualified to do a telephone business throughout the state of South Carolina. It is also set out in the bill of complaint that the complainant is a foreign corporation doing business in the state of South Carolina and a nonresident of the state of South Carolina. This allegation is insufficient. The state of South Carolina requires that, in order to permit foreign corporations to do business within its limits, they should perform certain stipulated acts, as prescribed in sections 2664, 2665, 2666, and 2667 of the Code of Laws of 1922. Proper pleading would require that it should be alleged that all those preliminary and additional acts had been performed, and not make simply the general allegation that the complainant is legally qualified to do a telephone business, especially in view of the positive provisions of section 2688 of the Code of Laws of 1922, which declares that it shall be unlawful for any foreign corporation to do business or attempt to do

business in the state without having first complied with the requirements of the law."

The South Carolina statutes referred to by that court have been compared with the Washington statutes above referred to, and the various conditions required to be performed by a foreign corporation under the laws of the two states are substantially the same.

It is true that the court in the case just cited went on to add that inasmuch as no exception had been taken to the complaint in this respect it might be assumed that, although the facts are not well pleaded, compliance had been had with the South Carolina statutes. In the instant case, however, the defendants urged this defect in the bill of complaint at the argument before the district court on the motion to dismiss, and the Southern Bell case was particularly called to the court's attention at that time.

Other cases to this same effect, that a complaint is demurrable if a foreign corporation does not plead the ultimate facts showing a compliance with the constitution and laws of the state in which the suit is brought, are:

*Valley Lumber Company v. Dreissel,* 93 Pac. 765;

*Valley Lumber Company v. Nickerson,* 93 Pac. 24;

*Kiesel v. Bybee,* 95 Pac. 20;

*Bonham National Bank of Fairburg v. Grimes Placer Mining Company,* 111 Pac. 1078;

*Consolidated Wagon & Machine Company v. Kent,* 132 Pac. 305;

*Acorn Brass Manufacturing Company v. Rutenberg,* 132 N. Y. S. 600;

*Frick Co. v. Pultz,* 147 N. Y. S. 732;

*Wood & Selich v. Ball,* 83 N. E. 21;

*Gerrick & Gerrick Co. v. Llewellyn Iron Works,* 105 Wash. 98, 177 Pac. 692;

*Guin v. New England Mortgage Security Co.,* 8 So. 388;

*Heiliman Brewing Co. v. Peimeisel,* 88 N. W. 441;

*Aetna Indemnity Co. v. Geo. A. Fuller Co.,* 73 Atl. 738.

The Home Telephone & Telegraph Company is a Washington corporation, and the foregoing objections are therefore not applicable to the complaint of that company.

(c) *No Allegations as to Compliance With Sections 10371, 10372 and 10376, Rem. Comp. Stat., re Rate Tariffs.*

Section 10371, Rem. Comp. Stat., provides in part as follows:

"All rates, tolls, contracts and charges, rules and regulations of telephone and telegraph companies, for messages, conversations, services rendered and equipment and facilities supplied, whether such message, conversation or service to be performed be over one company or line or over or by two or more companies or lines, shall be fair, just, reasonable and sufficient * * *."

The bill of complaint recites that the appellant filed with the department of public works of the state of Washington a certain proposed schedule of rates for exchange telephone service, copy of which schedule is in the Pacific case (Tr. No. 540, p. 33) exhibit "B" in the Home case (Tr. No. 539, p. 13) attached to the bill of complaint as exhibit "C," and also filed a certain proposed schedule of toll rates in the Pacific case, which is attached to the bill of complaint as exhibit "B" (Tr. No. 540, p. 26). It is further stated that said department held hearings and made findings and conclusions and by its order of March 31, 1923, denied said proposed schedules for increased rates and continued in effect the existing rates. No application was made to the department of public works for a rehearing on its said order, nor was any resort had to the courts of the state of Washington to review the said order, and under the statutes of this state, such order became final and the rates tendered in exhibits "B" and "C" became entirely null and void and of no further effect.

It is apparent, therefore, on the face of the bill, that the appellants have not filed with the department of public works any schedule of rates, either toll or exchange, other than the existing rates set forth in exhibit "A" to the complaint, which were continued in effect by the department's said order. Although the bill of complaint seeks to have said order of the department declared void, the complaint contains no allegation that any fair, just, reasonable

and sufficient rate other than the existing rate has been filed with the commission subsequent to the entry of said order and contains no allegation of a willingness to file such fair, just, reasonable and sufficient rate and comply with the statute referred to.

It is true that subsequent to the filing of the bill of complaint herein, the appellants did file with the department of public works a schedule of rates corresponding to exhibit "F" attached to the bill. This schedule, however, was subsequently abandoned by the appellants and denied by the department, as will be more fully considered later.

Section 10372, Rem. Comp. Stat., provides in part:

"Every telephone and telegraph company shall file with the commission and shall print and keep open to public inspection at such points as the commission may designate, schedules showing the rates, tolls, rentals, contracts and charges of such companies for messages, conversations and services rendered and equipment and facilities supplied for messages and services to be performed within the state between each point upon its line and all other points thereon, and between each point upon its line and all points upon every other similar line operated or controlled by it, and between each point on its line or upon any line leased, operated or controlled by it and all points upon the line of any other similar company, whenever a through service and joint rate shall have been established or ordered between any two such points. If no joint rate covering a through service has been established, the several companies in such through service shall file, print and keep open to public inspection as aforesaid the separately estab-

lished rates, tolls, rentals, contracts and charges applicable for such through service. * * *"

Section 10376, Remington's Compiled Statutes, provides:

"No telephone or telegraph company shall charge, demand, collect or receive different compensation for any service rendered or to be rendered than the charge applicable to such service as specified in its schedule on file and in effect at that time, nor shall any telephone company or telegraph company refund or remit, directly or indirectly, any portion of the rate or charge so specified, nor extend to any person or corporation any form of contract or agreement or any rule or regulation or any privilege or facility except such as are specified in its schedule filed and in effect at the time, and regularly and uniformly extended to all persons and corporations under like circumstances for like or substantially similar service. * * *"

The federal court has no power to fix rates. Its function in a case of this nature is confined to a determination as to whether or not the rate fixed by the department of public works is confiscatory.

*Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362; 38 L. ed. 1014;

*Interstate Commerce Commission v. Cincinnati, etc.*, 167 U. S. 479; 42 L. ed. 243;

*Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S. 298; 58 L. ed. 229;

*City of Toledo v. Toledo Railways & Light Co.*, 259 Fed. 450;

*Monroe Gas, Light & Fuel Co. v. Michigan Public Utility Commission*, 292 Fed. 139.

These statutes are proper police measures of the state and do not violate any provision of the federal constitution. It is necessary that the appellants comply with these provisions of the state statutes, and before they are entitled to seek equitable relief from a federal court, the bills of complaint must affirmatively show a compliance with all of the provisions of these sections and a willingness to continue to comply with such state requirements. No such allegation is contained in the complaint and it is evident that unless the appellants are willing to comply with these requirements, the federal court could afford no relief.

(*d*) *Department's Order Presumptively Correct.*

Section 10449, Remington's Compiled Statutes, provides:

"Whenever the commission has issued or promulgated any order or rule, in any writ of review brought by a public service company to determine the reasonableness of such order or rule, the findings of fact made by the commission shall be *prima facie* correct, and the burden shall be upon said public service company to establish the order or rule to be unreasonable or unlawful."

The *prima facie* reasonableness of the orders of this department have been repeatedly recognized by the Washington supreme court.

*State ex rel. Great Northern Ry. Co. v. Public Service Commission*, 76 Wash. 625, 634; 137 Pac. 132;

*Puget Sound Electric R. v. R. R. Commission,* 65 Wash. 75, 98; 117 Pac. 739;

*State ex rel. Public Service Commission v. Skagit R. etc., Co.,* 85 Wash. 29, 39; 147 Pac. 885;

*State ex rel. G. & M. Auto F. v. Department of Public Works,* 124 Wash. 234, 236; 214 Pac. 164;

*N. P. Ry. Co. v. Department of Public Works,* 125 Wash. 584, 593; 218 Pac. 507.

Furthermore, this court and the lower federal courts have also repeatedly recognized the *prima facie* reasonableness of the orders of the state commission and the burden thereby imposed upon the complainant.

*R. R. Commission v. Cumberland Tel. & Tel. Co.,* 212 U. S. 414, 421, 423; 53 L. ed, 577, 581;

*Darnell v. Edwards,* 244 U. S. 564, 569; 61 L. ed. 1317;

*Minneapolis & St. Louis R. Co. v. Minneapolis ex rel. R. R. & W. Commission,* 186 U. S. 257, 264; 46 L. ed. 1151, 1156;

*S. P. Co. v. R. R. Commission,* 193 Fed. 699, 703;

*Tex. & P. Ry. Co. v. R. R. Commission,* 192 Fed. 280, 284;

*Louisville & N. R. Company v. R. R. Commission,* 208 Fed. 35, 40;

*Cumberland Tel. & Tel. Co. v. Louisiana Public Service Commission,* 283 Fed. 215, 217.

(e) *Allegations of Complaints Insufficient to Overcome Prima Facie Correctness of Department's Order.*

A great many more cases to the same effect might be cited. We are stressing the attitude of the federal courts toward the *prima facie* correctness of the order of the state department for the reason that the appellants have set forth the order of the department in full as exhibit "D," in the Pacific case (Tr. No. 540, p. 38), and exhibits "C" and "D" in the Home case (Tr. No. 539, pp. 17, 24), attached to and made a part of the bills of complaint. When the *prima facie* reasonableness of these orders is taken into consideration, it is, we think, plainly apparent that it becomes the duty of the appellants to plead facts in the complaints in such detail that, if true as they are confessed to be on a demurrer, they will overcome the *prima facie* correctness of the department's findings. A most casual inspection of the order of the department in the instant case and the complaints will show that no such facts have been pleaded. For instance, in the matter of the rate base, the first paragraph of the department's order finds that the value of the telephone properties in the state of Washington, including the Spokane exchange, used and useful in public service on June 30, 1922, was $32,108,853.76. In paragraph V of the findings (Tr. No. 539, p. 38, No. 540, p. 51) an estimate is made of the revenue for the year 1923 under the present rates and the proposed rates. In esti-

mating the return for that year, a rate base was used by the department of $34,789,635. This rate base would correspond to the figures alleged in the complaint as of December 31, 1922. The complaint in the Pacific case alleges that the cost of the complainant's property in the state of Washington, exclusive of Spokane, used or useful in furnishing telephone and telegraph service to the public therein as of December 31, 1922, is $29,347,254 (Tr. No. 540, p. 4). The corresponding figure in the Home complaint for the Spokane exchange is $4,266,899 (Tr. No. 539, p. 3), a total of $33,614,153. It will be noted that the value used as a rate base in the department's findings for 1923 is $1,175,482 in excess of this cost figure pleaded by the complainants. The complainants allege that they are entitled to a net return of eight per cent on what they term the fair value of the property which for the Pacific Company in the state of Washington is alleged to be $35,616,896 (Tr. No. 540, p. 5), and for the Home property $5,710,684 (Tr. No. 539, p. 4), a total for the combined properties of $41,327,580, which is $6,537,945 in excess of the rate base used by the department for 1923. No information is given in the complaint as to the items that make up this fair value over and above the rate base adopted by the department, and it would seem to us plainly incumbent upon the complainant to give the court and the defendants this information.

A reading of the department's order will disclose that two of the principal items upon which the

department and the appellants differ are depreciation and four and one-half per cent contract. Both of these are discussed at length in the department's findings but no reference whatever is made to them in the complaints. The complaints make no direct allegation of the net revenue, expressed in dollars. This revenue is alleged in a roundabout way as being a certain percentage of the cost, and a certain percentage of the fair value. It is also set forth in an equally indirect way by stating that the net revenue was less by a certain amount than the net revenue would have been had they been permitted to earn eight per cent on the cost. We do not believe this is a proper way to plead the net revenues, and some arithmetical computations based upon the figures set forth in the complaint will show that even those figures have been carelessly computed. Thus, for instance, in the Pacific case, it is alleged that in the year 1922 the company's net revenues for the state were 3.17 per cent of the cost. Three and 17-100 per cent of $29,347,254 is $930,307.95. It is further alleged that the net revenues in the state for the year 1922 were 2.58 per cent of the fair value. That percentage of $35,616,896 is $918,915.92, a figure less by $11,392.03 than the 3.17 per cent of the cost. As the net revenue is a fixed figure and was known at the time of drawing the complaint, there is no excuse for a difference of this amount. The corresponding differences for the Seattle exchange are $5,035.49; Tacoma exchange $226.29; and Spokane exchange $790.20.

It is alleged that the difference in net revenue between eight per cent of the cost and 3.17 per cent of the cost in the state for the year 1922 is $1,310,651. The actual difference between those percentages of the pleaded cost is $1,417,472.37, or a difference between the figures pleaded and the figures computed of $106,821.37, a fairly substantial figure. The corresponding differences for the Seattle exchange are $136,945.35; Tacoma, $3,217.29; and Spokane, $2,296.88. No figure for depreciation or depreciation reserve is pleaded whatever, except that one may be obtained by subtracting the alleged cost of reproduction less depreciation from the alleged cost of reproduction. We respectfully urge upon this court that this method of pleading these important figures is entirely insufficient to overcome the *prima facie* correctness of the department's findings, and that such a complaint is not good when challenged by demurrer at the beginning of the action.

While we believe that the department's order is *prima facie* correct and should be so regarded by this court in considering these appeals, we wish to call the following authorities to the court's attention as tending to show that if the department's order be erroneous at all, it is in being too liberal rather than too severe on the appellants.

There should not have been included in the rate base established by the department, and there should be deducted therefrom as a matter of law, the following items:

1. Construction work in progress. (Tr. No. 530, pp. 22, 28; Tr. No. 540, p. 42.)

*In re San Joaqin L. & P. Corp,* P. U. R. 1920D, 940;

*In re W. Va. Water & Elec. Co.,* P. U. R. 1920D, 409;

*Hoffman v. Elmira W. L. & R. Co.,* P. U. R. 1921C, 409;

*In re Wisconsin Tel. Co.,* P. U. R. 1922B, 553;

*In re Southside Water Works Co.,* P. U. R. 1920D, 752;

*Re Two States Tel. Co.,* P. U. R. 1921B, 405;

*King Co. Lighting Co. v. Nixon,* (Dist. Ct.) 268 Fed. 143;

*Bluefield Water Works & Imp. Co. v. Pub. Serv. Com.,* 110 S. E. 205.

2. Amounts due from subscribers and agents. (Tr. No. 539, pp. 22, 28; Tr. No. 540, p. 42.)

3. Accrued depreciation reserve. (Tr. No. 539, pp. 23, 30; Tr. No. 540, p. 43.)

*Railroad Com. v. Cumberland Tel. & Tel. Co.,* 53 L. ed. 577, 582;

*In re Cumberland T. & T. Co.,* P. U. R. 1922E, 86, 101;

*Meridian v. M. S. L. Co.,* P. U. R. 1921B, 611, 616;

*Re Consumers Co.,* P. U. R. 1923A, 418, 430;

*Missouri ex rel. S. W. Bell Tel. Co. v. Pub. Serv. Com.,* 262 U. S. 276; 43 Sup. Ct. 544.

*City of Cincinnati v. Pub. Utilities Com.,* 137 N. E. 36, 43 (Ohio).

4. The Pacific case involves a consideration of the new machine switching project installed in the city of Seattle. The department's order devotes considerable space to a discussion as to the treatment accorded this project. (Tr. No. 540, p. 40.) The appellant's forecast that its property in the Pacific case will be confiscated by existing rates is based on the theory of past operating expenses, although such expenses have not been pleaded, and a rate base which includes a machine switching system subsequently to be placed in operation, although the costs of such system have not been pleaded. The department found that this machine switching system would greatly reduce expenses of operation when put in service. This finding is not denied in the bill and is *prima facie* correct. If the machine switching project will not reduce expenses, it should be deducted from the rate base as an injudicious investment, as it is not contended in the bill (or by anyone) that doing one's own telephone operator work is an advantage to the subscriber.

(*f*) *Complaint Fails to Segregate Interstate and Intrastate and Toll and Exchange Business and Contains No Facts as to Revenue and Expenditures.*

In addition to the failure to sustain the burden of pleading sufficient facts to overcome the *prima facie* correctness of the department's order, we wish to call attention to the failure to in any way segregate

intrastate and interstate values, revenues and expenses, and similar failure to segregate toll and exchange figures, and the failure to allege any figures whatever as to revenues and expenses. The failure to make such allegations in the complaint has been repeatedly held fatal to the sufficiency of the complaint, and for convenience of treatment, we will first point out the deficiencies in the complaint in that respect, and then collect in one group a number of cases relative to such matters.

The bill of complaint in the first paragraph of the Pacific case (Tr. No. 540, p. 1), alleges that the appellant is now engaged in operating and conducting a public telephone and telegraph system in the state of Washington and elsewhere, and a similar allegation is made with reference to conducting a telephone exchange in Spokane and vicinity in the Home complaint (Tr. No. 539, p. 1). In the 10th paragraph of the Pacific complaint (Tr. No. 540, p. 4), and the 8th paragraph of the Home complaint (Tr. No. 539, p. 3), it is alleged that the cost to the appellant of its property now being used or useful in furnishing telephone service to the public therein is a certain amount. Neither of these paragraphs allege that the complaint relates to intrastate business only, and we think the court can take judicial notice of the fact that the telephone exchanges of the company throughout the state and in the cities of Seattle, Tacoma and Spokane are used for both intrastate and interstate business. This being so, it

is incumbent upon the company to plead the proportions or amounts of its property devoted to interstate and intrastate, and the revenues and expenses of the two branches of service. It might very well be true that the revenues or expenses of the interstate service were too high or too low, and the proportionate amount of such interstate service might be so great as to have a very material bearing upon the revenues and expenses in the intrastate service. The relation between these two branches of service is pointed out by this court in the case of *Smyth v. Ames,* 169 U. S. 466, 541; 42 L. ed. 819, 847:

"The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the state has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business."

And in the case of *Cumberland Tel. & Tel. Co. v. Louisiana Public Service Commission,* 283 Fed. 215, 218, the district court for the eastern district of Louisiana stated that,

"In considering intrastate rates, the value of property used in intrastate business should be considered separately and not in connection with the value of property used in interstate business," citing the Minnesota Rate Cases, 230 U. S. 352; 57 L. ed. 1511.

No distribution is made as to values, revenues, and expenses between toll service and exchange service. It seems to us that the distinction between these two kinds of service is closely analagous to the distinction between freight and passenger service in railroad cases. In the Pacific case, increased rates are asked for on both exchange business and toll business, but in the Home case, exchange rates only are involved. It may well be that the existing rates as to either exchange or toll may be too low or too high, and that would have a corresponding effect upon the rates for the other kind of service. The court and the defendants are entitled to have before them definitely pleaded information as to the relation between these two kinds of service.

We have heretofore commented on the method of pleading net revenues. No allegations whatever are made as to gross revenues, and the only reference to expenses is that contained in paragraph X of the Home complaint (Tr. No. 539, p. 4), and paragraph XII of the Pacific complaint (Tr. No. 540, p. 5), to the effect that the appellant's business has been conducted efficiently and economically. This is wholly a conclusion of law not admitted by the demurrer and entirely valueless when unsupported by any pleaded facts as to the expenses.

(*g*) *Cases Cited in Support of Sections* (*e*) *and* (*f*).

In support of the objections urged against the sufficiency of the bill in the preceding paragraphs,

we call the court's attention to the following well considered cases:

*Southwestern Tel. & Tel. Co. v. City of Dallas,* 131 S. W. 80, 85. In this case the Court of Civil Appeals of Texas considered an appeal from the district court denying an application for an injunction against the enforcement of an ordinance of the city of Dallas. The court affirmed the order of the lower court sustaining the defendant's exceptions to the complaint, and with reference to the pleadings of fact stated:

"Before a complainant be allowed to attack a just and valid law, he should be prepared and willing to disclose to the court the most clear and exact detail of facts on which he relies. It is not enough that he gives his estimate of results. His statement should be both ingenuous and convincing. The allegations in plaintiff's petition are conclusions, rather than clearly stated facts. When it is alleged that this reduction of its earnings by reason of the 10 per cent discount will amount to $42,873.60 per annum 'upon the basis of its present number of subscribers,' it would appear that the gross earnings per annum will amount to $428,736 of an investment of $1,000,000. The court has a right to know for itself how these earnings are expended, what part is paid for labor or salaries, and what portion may cover interest on money borrowed or to be used for repairs, and how much is paid out for dividends or betterments. The court would also have the right to know the character and cost of the properties of appellant in detail and determine for itself their reasonable values."

In the case of *Oregon R. & Nav. Co. v. Campbell,* 173 Fed. 957, 991, the district court of Oregon sustained a demurrer and denied an injunction in a suit

to enjoin the Oregon State Board of Railroad Commissioners from putting a certain schedule of rates into effect. With reference to the sufficiency of the complaint, the court observes:

"But the fault with the bill is that no facts are stated as to the cost of the service, or in any way indicating what it is worth to transport freight over the lines of the complainant between the points designated, and the court is, therefore, unable to say from the bill that the rate fixed by the commission is unreasonably low. Especially are these and similar averments insufficient, when read in view of the particular theory upon which the suit is instituted.

"Based upon the foregoing considerations, the demurrer to the bill should be sustained, and the preliminary restraining order should, consequently, be dissolved.

"It is proper to say further, however, that I have carefully examined the affidavits and showing made for a continuance of the injunction, and I am of the firm opinion that the proofs are wholly insufficient to overcome the *prima facie* case that attends the order of the commission, supported by the ample showing of the defendants."

The complainants amended their complaint, and demurrer to the amended complaint was again sustained by the same court in *Oregon R. & Nav. Co. v. Campbell,* 177 Fed. 318. The order sustaining the demurrer to the amended complaint was carried on appeal to this court and affirmed in *Oregon R. & Nav. Co. v. Campbell,* 230 U. S. 525; 57 L. Ed. 1604.

In the case of *Missouri K. & T. Co. v. Love,* 177 Fed. 493, the Circuit Court for the western district of Oklahoma granted a temporary injunction, but

the following observations relative to the necessary pleadings with regard to state and interstate and freight and passenger traffic are applicable in the instant case (p. 497):

"When the railroad within the state is used in both interstate and local commerce it is necessary next to determine what part of its value should fairly be considered as devoted to each use separately, because obviously the company should not exact such excessive rates for local traffic as will also produce a return upon a value employed in a business over which the state has no control. Neither class of traffic, interstate or local, should be made to bear a burden caused by paring the rates on the other to the quick. It is generally agreed that, given the entire value of the railroad property in the state, it is fair to apportion it among the different kinds or classes of business upon a revenue basis, that is to say, in proportion to the gross revenue produced by them respectively. And a like rule applies when the questions involved require separate consideration of the freight and passenger business. In this way will be found the fair proportion of value devoted to each particular use, upon which the owner is entitled for such use to a reasonable return. * * * In these cases, therefore, the total value of the railroad property in Oklahoma of each complaining company, viewed in all its aspects, should be apportioned according to the rule mentioned, and assigned separately to interstate and local business, to freight and passenger business, and to mail, express and miscellaneous business, so the effect of the contested rates may be ascertained."

In the case of *Southern Pacific Company v. Campbell*, 189 Fed. 182, the circuit court for the district of Oregon sustained a demurrer to a bill to enjoin the enforcement of a rate order of the state rail-

road commission. With reference to the facts alleged in the complaint, the court observed at p. 187:

"Again, the complainant does not state the amount of intrastate traffic which will be affected by the order, nor the cost of service, nor the value of the property devoted to such business. It sets out the value of the entire property, the gross receipts and disbursements for both state and interstate business for a number of years prior to the date of the order, the amounts received from state and interstate business, freight and passenger, during the year 1909, and approximate percentage of tonnage affected by the order sought to be enjoined, assuming, as I take it, that both local and interstate traffic are affected by such order. *There is no allegation as to the cost of conducting state business as distinguished from interstate business, and no statement of the difference between passenger and freight expenses.*

"The demurrer should be sustained, and it is so ordered." (Italics ours.)

This case was also appealed to the supreme court (see *Southern Pac. Co. v. Campbell,* 230 U. S. 537, 57 L. Ed. 1610), and the lower court was affirmed. With reference to the sufficiency of the complaint, Justice Hughes remarks at p. 549:

"The order, as already noted, was made in September, 1910, and the bill was brought in October, 1910, but the *receipts and disbursements* for the fiscal year ending June 30, 1910, were not given. In addition to this omission, *the bill was destitute of any allegation showing the expenses incurred in the conduct of the intrastate business as distinguished from the interstate business,* or the *share of the value of the property which was assignable to the former. In short, the allegations of the bill were wholly insufficient to show that the complainants would be de-*

*prived of just compensation in their business of intrastate transportation by virtue of the operation of the order.*

"In sustaining the demurrer, the court gave to the complainants thirty days in which to plead further; and they thus had opportunity for amending their bill so as to present additional averments which would correct deficiencies in the original allegations and remove any possible misapprehension as to the facts intended to be set forth. But the complainants informed the court that they did not desire to avail themselves of this opportunity and accordingly the bill was dismissed. We think that it cannot be said that any error was committed in thus disposing of the contention as to confiscation." (Italics ours.)

In the case of *Southern Pacific Co. v. Railroad Commission,* 193 Fed. 699, the district court for the northern district of California, southern division, dismissed a bill against the Railroad Commission of California to enjoin the enforcement of certain rate orders. With reference to the insufficiency of the facts pleaded in the complaint, the court states at p. 704:

"When these principles are applied to the present bill, I think it is at once apparent that it fails to put the court in possession of substantive facts sufficient to enable it to sustain the view that the rates are confiscatory. It consists too largely of matters of mere opinion, and general conclusions, more in the nature of assertions or predictions of the effect the rates will have than ultimate facts from which such effect may be deduced. Of course, the general averment that the rates are unjust and unreasonable, if left unsupported by the facts, is not sufficient to impress them with that character. That is a con-

clusion which is not, as we have seen, admitted by the demurrer. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 401, 14 Sup. Ct. 1047, 38 L. Ed. 1014. There must be something more specific than that. While the total present value of the road affected is alleged, no statement is made to show what part of this total value is assignable to state traffic as distinguished from interstate business, nor what proportion of such value is properly to be assigned to the particular traffic affected by the rates fixed as distinguished from other traffic. Nor is any attempt made to segregate the values properly assignable to passenger traffic as distinguished from freight traffic. The same defects are apparent in the statement of operating expenses and charges. The gross operating expenses for one year are given, but no facts are alleged to show what proportion of these expenses are chargeable to state business as distinguished from interstate business; how much to local freight traffic as distinguished from local passenger traffic; nor how much to the particular traffic affected by the order in question. It is alleged that the 'known loss on said branch by reason of the order of the defendant will be $112,439.63,' but there are no sufficient facts to show how this result is to be arrived at. Elsewhere it is averred that complainant's principal business between the points affected consists of interstate commerce, and that it will be compelled to 'lower all its interstate rates upon freight, merchandise and commodities moving between said cities of San Pedro and Los Angeles, and reduce said rates conformable to those assumed to be charged by said defendant;' but there is no averment as to what portion of the predicted loss will be on the traffic affected by the order as distinguished from the general body of traffic. These omissions leave the further averment in the bill that the enforcement of the order will reduce complainant's income on the investment affected to but 2.22 per cent., standing as a mere conclusion unsupported by the facts alleged."

In the case of *Atlantic Coast Line R. Co. v. Interstate Commerce Commission,* 194 Fed. 449, the commerce court sustained the special demurrer in part, and in so doing states its reasons at p. 454, in the following language:

"We think the demurrer in some of its specifications as to the paragraphs mentioned must be sustained. In determining this question, we must remember that the petitioners are asking this court to enjoin and suspend an order of the commission fixing rates for the future, in the making of which the commission exercises a legislative function. The importance of the judgment we are asked to render in the matter must not be overlooked. Before we may annul the order, we must be clearly satisfied it is our duty to do so. *In view of the character of the order and the importance of our action in reference thereto, we believe that this court is entitled to, and must require of the petitioners, a full and fair statement of all the facts upon which they rely for relief.* It is only in rare instances that conclusions of fact or law may be rightly pleaded. The court ought to be permitted so far as possible to draw its own conclusions from the facts stated by the pleader. * * * We do not say that in cases where cost of service cannot be shown a violation of the fifth amendment may not be made out in other ways, but, when petitioners undertake to plead the items of revenue, cost of service, and profit, we are entitled to more information concerning them than is contained in the bill in this case. *Whatever information exists bearing upon the contentions of petitioners is largely in their possession, and in cases of this kind no material information should be withheld, consistent with the rules of good pleading.* We are sustained in these views by the decisions of *L. & N. Ry. Co v. Siler* (C. C.) 186 Fed. 190, and *Southern Pacific Co. v. Campbell* (C. C.) 189 Fed. 182." (Italics ours.)

In the case of *Northern Pacific Ry. Co. v. Lee*, 199 Fed. 621, the district court for the western district of Washington, southern division, being the same court in which the instant case was started, sustained the demurrers to a bill brought to enjoin enforcement of certain orders of the Public Service Commission of Washington. The insufficient allegations of the bill are thus pointed out by Judge Cushman at p. 631:

"The tabulation of values, revenues, and expenses in both bills of complaint fail to disclose the net revenue derived in the past under the old rates from the classes of freight included in the Commission's order. They do not disclose the amount of expenses properly chargeable to those classes; nor set out any estimate of what the revenue and expense would be on the same under the Commission's order. They do not disclose what, if any, net revenue has been realized from the intrastate freight rates not affected by the order, nor whether the same were carried at a profit or loss.

"The Great Northern bill does not show the expenses properly chargeable to intrastate freight, alleging that the expenses cannot be ascertained with mathematical certainty. The presumption upon demurrer would, therefore, be that freight, other than in those classes affected by the order, was not carried at a profit. There must be some point beyond which a carrier cannot go in discriminating in freight charges against various classes of freight, else one class may be compelled to bear the expense of the whole traffic.

"Without deciding the question finally upon these demurrers, it is held that it is not sufficient to justify the revenue received on the freight rates as a whole, but that the facts should be given justifying the rates, as a whole, changed by the Commission;

that this cannot be done without a segregation of those classes and rates from the others."

In the case of *Portland Railway Light & Power Co. v. City of Portland*, 200 Fed. 890, the district court for the district of Oregon denied an application for a preliminary injunction in a suit to restrain the city officials from enforcing an ordinance prescribing maximum rates for gas and electric light companies. The court commented on the insufficient allegations of the complaint at p. 892 as follows:

"There are no facts stated in the complaint showing that the rate complained of is confiscatory, or that, if enforced, it will deprive the complainant of its property without just compensation, nor is there even a general allegation to that effect. The averments are, in substance, that the cost to complainant of maintaining generating capacity for, and service connections with, each consumer exceeds the sum of 50 cents per month, and that a reasonable charge therefor is $1 per month; that the minimum rate prescribed by the city, if enforced, will reduce the revenue of the complainant by 'sums aggregating many thousand of dollars per month, and to an amount less than the actual cost of furnishing the service,' and will deprive the complainant of the right to receive from each consumer the cost of supplying the same to him. These matters might be important, if addressed to a rate-making tribunal; but the court has no authority to fix rates, nor should it attempt to assume such a power and set aside rates fixed by a legislative body, because it might, upon investigation, come to a different conclusion as to the reasonableness thereof. In a case of this character, the court can review the action of the rate-making body only so far as to determine whether or not, under the rate prescribed and the other rates which

the complainant may lawfully charge, it will be unable to realize a fair and just return on the value of its property devoted to the particular public use, and will amount to a taking of its property without just compensation. *Willcox v. Cons. Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034; *Lincoln G. & E. Co. v. Lincoln* (C. C.) 182 Fed. 926."

The case of *Cumberland Tel. & Tel. Co. v. Louisiana Public Service Commission*, 283 Fed. 215, was cited above on a question of failure to segregate interstate and intrastate business and we now quote further from that case as to both the interstate and intrastate, and exchange and toll business, from p. 218 as follows:

"The commission contends that there should be other large deductions from the capital invested and from the operating costs; but it is not considered necessary to pass upon these contentions of the commission, for the reason that the case as made by the plaintiff does not, in our opinion, sustain a right to the relief sought. *There is no separation of values, revenues, cost of operation, or earnings, either as between interstate and intrastate business, or as between intrastate exchange and toll business.*

"The plaintiff was put upon notice by the order of April 1, 1921, by which the question of the reasonableness of its rates was reopened for further investigation, that the rates might be reduced again, and that the order of February 26, 1921, was temporary in its nature. The burden, therefore, remained upon the plaintiff, as the moving party, to separate, not only its interstate from its intrastate telephone business, but also its intrastate exchange business from its intrastate toll business, *and to show by facts, and not by estimates*, that the rates attacked were not sufficient to enable it to earn a fair return upon the

value of its intrastate exchange business. Before the rates authorized by rate-making bodies are interfered with by the courts, the evidence ought to be clear and convincing that the rates attacked are inadequate." (Italics ours.)

(*h*) *Prendergast Case Not Applicable.*

Many of the matters discussed in the three preceding paragraphs were called to the attention of the district court at the time of the hearing on the motion to dismiss on December 31, 1923, and no doubt influenced the court in holding that the complaint was insufficient for want of equity and lack of necessary averments of facts. In answer to these arguments, counsel for the appellants stated that the bills of complaint in the instant cases were copied so far as possible from the bill of complaint in the New York Telephone Company case referred to by this court in the case of *Prendergast v. New York Telephone Company*, 262 U. S. 43, and counsel stated that that complaint had been held sufficient by this court in the case referred to, and must, therefore, be considered as a sufficient and valid complaint by the district court in the instant cases. We wish at this time to call the court's attention to the *Prendergast* case, and point out the reasons why in our opinion it is not applicable to the bills of complaint now before this court. This court, in the *Prendergast* case in commenting on the sufficiency of the bill of complaint then before it, stated at p. 47:

"The defendants answered the bill on the merits without questioning in any way the sufficiency or

form of its averments. See *Campbell v. U. S.*, 224 U. S. 99, 106."

In the *Campbell* case, this court held that the objection to the sufficiency of an answer could not be raised for the first time in an appellate court. The court stated at p. 106:

"But of this it is enough to say that no such objection was made in the district court, but, on the contrary, the answer was treated as sufficient in that respect. This being so, the plaintiff was not at liberty to raise the objection in an appellate court. Had it been made seasonably, it could and doubtless would have been avoided by an amendment."

If the court in the *Prendergast* case had stopped with the citation of the *Campbell* case it would have fully disposed of the question before it relative to the sufficiency of the complaint, and any further comments relative to the complaint are dicta and the question then becomes one as to whether by such dicta the court has intended to put the stamp of its approval upon pleadings of the character we have pointed out. It is to be remembered in the instant cases that the appellees have at all stages challenged the sufficiency of the bills, and that the appellants have not requested leave to amend, but have elected to stand on the sufficiency of their complaints as filed. Furthermore, in the *Prendergast* case a hearing on the merits on the application for the preliminary injunction had been held before the three judges, and the preliminary injunction had been granted. Defects in the complaint were not only

waived by the answer, but were no doubt to a considerable extent cured by the evidence introduced before the three judges. Under conditions such as existed in the *Prendergast* case at the time it was considered by this court, it was possible to accept the complaint as sufficient and not inquire too closely into the nature of the allegations contained therein, but we earnestly ask this court at the present time to examine carefully the allegations contained in these bills, bearing in mind that their sufficiency has at all times been challenged, and that the bill has not been answered, and that no evidence has been taken in support of the bill, and that the order of the Department is *prima facie* correct. We are confident that when so tested, the bills of complaint will be found fatally defective, and that they are not within the conditions set forth in the *Prendergast* case.

Incidentally, we might say further that in the dicta in the *Prendergast* case on p. 47, the court states that the bill alleged, among other things, the cost of the company's property in the state devoted to the rendition of *intrastate* telephone service. We do not have a copy of the bill in the *Prendergast* case, and therefore do not know what distinction that bill showed as between intrastate and interstate, but we have endeavored to point out in a preceding paragraph that the allegation in the bills in this case is not an allegation of the value of its property devoted to intrastate service, and that to that extent at least it may vary from the bill in the *Prendergast* case.

If the dicta in the Prendergast case are held binding in the instant cases notwithstanding the challenging of the complaints by the defendants herein, it seems to us that the inevitable result is either to reject and cast into a discard the numerous well considered cases cited above under which railroad companies have been required to plead facts in considerable detail or else the telephone companies are to be relieved of the burden of pleading facts in the manner required of other utilities. We cannot believe this court will establish a rule in pleading which would so discriminate in favor of one class of utilities as against other classes.

(*i*) *Complaint Subject to Dismissal by Reason of Litigation Becoming a Moot Controversy.*

Furthermore, the complaint was subject to dismissal because the litigation had become a moot controversy. At the time the complaint was filed in the district court in April, 1923, although the district court was asked to place schedule "F" in effect temporarily, no such schedule of rates had ever been filed by the appellants with the Washington department of public works. The appellants apparently realized this discrepancy and rushed to Olympia and filed a schedule of rates conforming to the said schedule "F" just prior to the hearing on the application for an interlocutory injunction. The department of public works suspended the operation of this new schedule for the full statutory period, and

at the end of that period entered an order denying the application for the said schedule "F". Immediately prior to the date which the department had set for hearing on this schedule "F", the company under date of October 19, 1923, submitted to the department of public works, through its attorney, Otto B. Rupp, a statement which, as we are unable to refer to the page of the transcript, we set forth in full as follows:

"On October 16, 1923, there was served on the agent of the company at Olympia, Washington, a 'Notice of hearing re Tariffs covered by our suspension orders dated May 25, 1923, and August 18, 1923, increasing telephone rates particularly in Seattle, Tacoma and Spokane, at Olympia on October 24, 1923, at the hour of ten A. M.'

"Your Honorable Body will recall that on April 24, 1923, the Pacific Telephone and Telegraph Company brought a suit in the United States District Court for the Western District of Washington, Southern Division, in which it sought, among other things, to enjoin the enforcement of an order made by your Honorable Body on March 31, 1923, and that on April 24, 1923, that court issued an order in which, among other things, it restrained your Honorable Body, the Attorney General of the State of Washington and all other persons from interfering with or preventing the company from immediately putting into effect the rates and charges set forth in a schedule marked 'Exhibit F' and attached to the Bill of Complaint filed in that case.

"After the issuance of this order, and on April 28, 1923, the company filed with your Honorable Body the rates and charges set forth in said schedule 'Exhibit F'. At the time the company filed such rates and charges it notified your Honorable Body in writing that the schedule 'is made effective May 1,

1923, *under the authority of an order* issued April 24, 1923, by the District Court of the United States for the Western District of Washington, Southern Division, in cause No. 166-E.'

"Your Honorable Body on the same date stamped on said schedule the following: 'Tariff accepted *as tendered* for filing.'

"On April 30, 1923, a court convened as provided for by Section 266 of the Judicial Code of the United States, dissolved the restraining order issued by Judge Cushman on April 24, 1923.

"The company has always considered and has so stated in open court, that the filing of such schedule was but a step taken by it in rendering effective the restraining order issued on April 24, 1923, and the three-judge court convened as above stated so held in an opinion, rendered by that court and filed on May 23, 1923, in the case above referred to.

"The company never did charge its patrons the rates set forth in said schedule 'Exhibit F', for the reason that prior to the filing of said schedule, the restraining order which was the basis of the filing of said schedule, was dissolved.

"In order to remove all doubt as to the company's position, the company does hereby state that the dissolution of the restraining order *ipso facto* cancelled the filing made as aforesaid on April 28, 1923, and that the rates and charges set forth in schedule 'Exhibit F' never became the effective rates and charges."

This letter and the order of the department denying schedule "F" were embodied in an affidavit filed with the court by the attorneys for the appellees, and it was proper to call same to the court's attention by affidavit. *Puget Sound Power & Light Co. v. Seattle*, 271 Fed. 958, 963.

It is apparent, therefore, that the only definite relief sought from the federal court in the bill of complaint, to-wit, the application of the rates set forth in schedule "F" was voluntarily abandoned by the appellants after filing same with the department of public works. The schedules which the appellants had originally sought to have approved by the department are referred to as schedules "B" and "C" in the Pacific case and schedule "B" in the Home case. These schedules were in their entirety permanently suspended by the department, and such order of suspension has never been reviewed and reversed in the manner required by the state statutes. By filing schedule "F", all previous schedules were superseded, as the last schedule filed is necessarily the effective schedule.

*Coplay Cement Manufacturing Co. v. Public Service Commission,* 114 Atl. 649, 651;
*State ex rel. City of Billings v. Billings Gas Co.,* 173 Pac. 799, 802.

The public utility cannot play fast and loose with the department of public works by filing schedules one day and abandoning them the next, and having sought from the federal court an order establishing schedule "F" as the effective rates of the company, and having made formal application to the department of public works in the manner required by law for the application of such rates, and having failed to obtain the immediate relief sought from the

court and having abandoned the schedule filed with the department, it is submitted that the controversy as to this schedule "F" had become a moot one, and the complaint should have been dismissed on that ground as well as the other grounds upon which it was actually dismissed.

## CONCLUSION.

We have shown that the statutory court and the district court properly denied the application for an interlocutory injunction and the district court properly dismissed the complaint because the appellants had not exhausted their remedies in the state courts; that the state courts have legislative powers and that under the rule of comity and convenience established in the *Prentis* case, the company must exhaust its state remedies or show that it has applied to the state courts for relief and been denied before it can go into a federal court of equity for such relief. The appellants have contended in their briefs that they are entitled to special consideration at this time because they are suffering daily from confiscation. We have shown that the order of the department of public works is prima facie correct and the presumption is that it is reasonable and just, and that no adequate showing has been made by the company at any stage of these proceedings to overcome that presumption.

By formidable array of well considered cases, and an exhaustive analysis of the bills of complaint, we believe we have demonstrated that the bills in the instant cases do not meet the requirements of good pleading and were properly dismissed for want of equity and insufficient averment of facts.

We wish to remind the court that if it shall find our contentions well taken on either of the two main grounds, the premature bringing of the suit or the insufficiency of the complaint, it must affirm the order of the district court dismissing the suits. It is evident that if the suits were prematurely brought, then regardless of the sufficiency of the complaints, the companies are not entitled to be heard in the federal court at this time. On the other hand, even though it may be determined by this court that the suits were not prematurely brought, yet if the complaints are found to be insufficient, since the companies have elected to stand on such complaints and refused to amend, the order of the district court in dismissing the complaints was proper and should be affirmed.

It is admitted by appellants, and we think there can be no doubt in that regard, that even though this court should sustain the appellants throughout, its action should be limited to a remanding of the case to the district court for further proceedings in accord with the law as it may be determined in this appeal.

We therefore respectfully submit that the order of the statutory court of April 30, 1923, dismissing the temporary restraining order and denying an interlocutory injunction, and the decree of dismissal

of the district court of January 5, 1924, sustaining the motions to dismiss and dismissing the suits, are correct and should be affirmed.

Respectfully submitted,

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